APPENDIX A

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 12,568

SHELL OIL COMPANY,

Petitioner,

v.

FEDERAL POWER COMMISSION,

Respondent,

TEXAS GAS TRANSMISSION CORPORATION,

Intervenor,

and

LOUISVILLE GAS & ELECTRIC COMPANY,

Intervenor.

ON PETITION TO REVIEW AN ORDER OF THE FEDERAL POWER COMMISSION

Argued October 6, 1958

Before:

GOODRICH, McLAUGHLIN and STALEY,

Circuit Judges.

OPINION OF THE COURT

(Filed January 27, 1959)

By McLAUGHLIN, *Circuit Judge.*

This case is another in that line wherein the issue has been the effective rate on June 7, 1954 for natural gas sold by a so-called independent producer. That date was when the Supreme Court announced its decision in Phillips Petroleum Co. *v.* Wisconsin, 347 U. S. 672 (1954). The effect of

that decision was to subject independent producers of natural gas to regulation by the Federal Power Commission. The Commission, in implementing the decision, called for filing of rate schedules setting forth "• • • rates • • • effective on June 7, 1954."

What that rate was for Shell Oil Company in its contract with Louisiana Natural Gas Company[1] depends upon the contract-established provisions rather than on the fortuity of rates which were being actually paid on that date. See Natural Gas Pipeline Company *v.* Federal Power Commission, 253 F. 2d 3, (3 Cir. 1958), cert. den. 357 U. S. 927 (1958). The contract had been entered on May 1, 1951 and for the period in question provided for the sale of gas at 8.997¢ per Mcf, unless "• • • at any time after December 31, 1951, Buyer [Louisiana] • • • [should] enter into a contract providing for the purchase by it of gas • • •" produced and delivered within a fifty mile radius of any delivery point specified. In that event the contract price was to escalate to the same price as that called for by the subsequent contract with the other producer.

Louisiana had already succeeded to rights as purchaser under a contract entered with Atlantic Refining Company, another producer, in 1943. Under that contract buyer agreed to buy specified daily quantities of gas; it was provided that the rights of the parties should continue for the producing life of the field involved but for not more than twenty-five years. In that contract the buyer agreed to pay 2.2¢ net per Mcf for gas received for the first five years. No fixed price was established for periods after that, but rather the contract provided:

> "(b) At the end of the first five-year period, Buyer and Seller are to reach an agreement as to the price for gas sold and delivered under this contract during the second five-year period. The price

[1] Louisiana Natural Gas Company was a subsidiary of Texas Gas Transmission Corporation. On June 30, 1955 it was merged into the parent corporation.

to be paid during such second five-year period is to be agreed upon at the beginning of such period after a survey of prevailing prices for gas being sold in similar quantities in the southwestern part of Louisiana.

"(c) During succeeding five-year periods, price to be paid will be determined at the beginning of each period in the same manner as provided for in paragraph (b) above.

"(d) In the event that the parties are unable to agree upon the price to be paid for gas after the first five-year period, in accordance with the arrangements set forth in paragraphs (b) and (c) above, such determination shall be submitted to arbitration in accordance with Condition XII."[2]

A price for the second five year period had been agreed to by negotiation between the buyer and seller, but this agreement expired on August 31, 1953. Louisiana and Atlantic

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[2] Condition XII reads:

"• • • The party desiring such arbitration shall notify the other and in such notice shall name an arbitrator, (sic) the arbitrator to be appointed by the other party shall be named within ten (10) days after receipt of such notice of arbitration, and an additional arbitrator shall, within ten (10) days of the appointment of the second arbitrator, be selected by the two (2) arbitrators theretofore appointed, but if one of said parties shall have failed to appoint an arbitrator within the time provided herein, it is expressly understood and agreed that the sole arbitrator shall arbitrate the question alone. If arbitrators shall have been appointed by the respective parties and shall have failed to select the third arbitrator within the above stated time, the third arbitrator shall be appointed by the senior Judge of the 5th Federal Judicial Circuit upon application therefor by either of said parties to the arbitration.

"• • • The decision in writing signed by a majority of the arbitrators shall be final and conclusive with respect to the matter submitted and the parties hereto agree to accept and abide by the same."

undertook negotiations in September of that year for agreeing to a price for the third five year period.

The parties had difficulty in agreeing. The negotiations consumed five and a half months, finally culminating in an agreement dated February 17, 1954, whereby the price was established at 12.5¢ per Mcf, plus gathering tax. Shell thereafter accidentally learned of this and subsequently notified Louisiana that it felt entitled under its contract to an escalation of its price to the same 12.5¢ level.

There is no dispute that the fifty mile radius requirement of the Louisiana-Shell contract is satisfied. The argument concerning Shell's right to a higher price turns on whether the Louisiana-Atlantic agreement of February, 1954 was an "entering of a contract" which activated the price escalation clause of the Louisiana-Shell contract.

When Shell filed its rate schedule with the Federal Power Commission pursuant to the Commission's orders implementing the Phillips decision, the Commission neither accepted or rejected the submitted rate, pending further explanation by Shell of why it claimed 12.5¢ per Mcf. Shell presented that explanation in February, 1957 when it filed for an increase in rate to 16.75¢ per Mcf. The reasonableness of that rate is still awaiting hearing. The Commission at this point directed that a hearing be held to determine the effective rate on June 7, 1954 under the Shell contract which it simultaneously accepted for filing.

As a result of the hearing the examiner found the effective rate to be 12.5¢. This finding was subsequently reversed on November 12, 1957, by the Commission whose decision is here on appeal by Shell.

The clause in the Louisiana-Shell contract which is central to this controversy is one of the type commonly referred to in the trade as a "most favored nation" clause. The usual objective of such a clause is to assure the seller a top price for its gas. Testimony at the hearing before the Commission's examiner was that Louisiana had desired a twenty year contract which was for a term longer than

Shell had at that time ever contracted for, at least in that area. Because of difficulty in establishing a price for so long a period, the clause in question was agreed upon. It appears that at the time of contracting Shell knew Louisiana was purchasing gas from Atlantic but was not familiar with the specific terms of that contract. These facts tend strongly to demonstrate that the intention of the parties was for any higher price paid by Louisiana to another producer to trigger a rise on the Shell contract to the same figure except possibly where a pre-existing contract already provided for a settled step-up in price.

If the precise arrangement under the Atlantic contract had been known to Shell, then perhaps Louisiana could argue to more purpose that the wording of the Shell contract (which calls for the "enter[ing of] a contract providing for the purchase * * * of gas") was not intended to trigger escalation following an agreement on price when that agreement was reached under an earlier gas purchase contract which contained a binding agreement subsequently to agree on price. But even then the fact cannot be avoided that, at least for purposes of the favored nation clause, the "entering of a contract for the purchase of gas" has not been accomplished until the price has been established. True, Atlantic was obligated to deliver gas for twenty years from 1943 but, just as important, Louisiana was bound to pay for it. And while there may have been enforceable means for settling the rate of payment in the event the parties could not agree, it would nonetheless be true that it was when the price was finally established, by whatever means, that a contract had thereupon been entered. Actually, if the Louisiana-Atlantic agreement of February 17, 1954, was not an entering of a contract we are at a loss as to how it would be properly and legally characterized. The situation fits best into the rubric of an accord itself taken as satisfaction. See 6 Williston on Contracts, §§ 1841, 1846 (rev. ed. 1938). Both parties gave up their rights under the original contract to proceed to arbitration, prom-

ising on the one side to pay and on the other side to accept the price reached.

To make the date of the accord retroactive to the date of the original agreement-to-agree is, of course, abstractly conceivable; but for a court to attribute that effect to the Atlantic contract and apply it to the Shell contract in the absence of recognition of this possibility in the Shell contract would take the law out of the realm of business practicalities. It is far more in line with the realities of the situation to say that complete performance of the 1943 contract required the parties to enter into subsequent contracts. The entering into one of those subsequent contracts triggered the escalation clause in the Shell agreement.

We have assumed without deciding that the Atlantic contract of 1943 did in fact impose a binding agreement-to-agree on the price for gas in each of the contract's last four five year periods. Thus it has not been necessary to determine the several questions raised in connection with the arguments directed to that phase of the case. Of course if the Atlantic contract of 1943 was not a binding agreement-to-agree, that circumstance alone would place the February, 1954 Atlantic contract fully within the terms of the escalation clause in the Shell contract.

The Federal Power Commission order of November 12, 1957 finding Shell's rate with Louisiana on June 7, 1954 to be 8.997¢ per Mcf will be vacated. Because the escalation called for by the contract requires consideration of other factors in determining whether the price to another supplier was indeed higher, the cause will be remanded for consideration of those factors.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 12,568.

SHELL OIL COMPANY,

Petitioner,

vs.

FEDERAL POWER COMMISSION,

Respondent,

TEXAS GAS TRANSMISSION CORPORATION,

Intervenor,

LOUISVILLE GAS & ELECTRIC COMPANY,

Intervenor.

Judgment.

Present:

GOODRICH, McLAUGHLIN and STALEY,
Circuit Judges.

This cause came on to be heard on the record from the Federal Power Commission, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of November 12, 1957 of the Federal Power Commission be, and it is hereby vacated, and the cause remanded with directions to proceed in conformity with the opinion of this Court.

Attest:

IDA O. CRESKOFF,
Clerk.

January 27, 1959.

RECEIVED & FILED
JAN. 27 1959
IDA O. CRESKOFF
Clerk

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 12,568

SHELL OIL COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
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TEXAS GAS TRANSMISSION CORPORATION,
Intervenor,

and

LOUISVILLE GAS & ELECTRIC COMPANY,
Intervenor.

Present:

GOODRICH, MCLAUGHLIN and STALEY,
Circuit Judges.

Order.

The petitions for rehearing of Federal Power Commission, Texas Gas Transmission Corporation and Louisville Gas & Electric Company in this case are denied.

By the Court,

MCLAUGHLIN,
Circuit Judge.

Dated: March 4, 1959.

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MAR 5 1959
IDA O. CRESKOFF

APPENDIX B

Section 19(b) of the Natural Gas Act

[as it appears in 15 U. S. C. A. §717r(b) (Supp. 1958)]

[Rehearings; court review of orders]

(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals [*] of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to

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[*] "Circuit court of appeals" was replaced by "court of appeals" by act dated June 25, 1948, effective Sept. 1, 1948 (62 Stat. 869), as amended by act dated May 24, 1949 (63 Stat. 139).

be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

APPENDIX C

Section 10(e) of the Administrative Procedure Act

[Judicial Review of Agency Action]

[SEC. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—]

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. —

FEDERAL POWER COMMISSION, PETITIONER

v.

SHELL OIL COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the Federal Power Commission, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on January 27, 1959.

OPINIONS BELOW

The opinion of the court of appeals (*infra*, pp. 21–27) is reported at 263 F. 2d 223. The orders of the Federal Power Commission (R. 133–145, 153–162) are reported at 18 F.P.C. 617 and 19 F.P.C. 74.

JURISDICTION

The judgment of the court of appeals was entered on January 27, 1959 (*infra*, p. 28). A timely petition for rehearing was denied on March 4, 1959

(*infra*, p. 29). By order of Mr. Justice Brennan, dated May 25, 1959, the time within which to file a petition for a writ of certiorari was extended to and including July 2, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and § 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

The "favored-nation" clause of a contract for the sale of natural gas provided that the producer would be entitled to a price increase should the pipeline thereafter "enter into a contract providing for the purchase by it of gas" at a higher price. The pipeline thereafter agreed to a higher price under a pre-existing contract with another producer which required that the price be redetermined every five years on the basis of the then-prevailing prices, the price to be fixed by arbitration should the parties fail to agree. In proceedings under the Natural Gas Act to determine respondent's effective rate, its contract having been filed as a rate schedule, the Federal Power Commission held that the price redetermination under the pipeline's prior contract with the other producer was not a new contract for the purchase of gas within the meaning of respondent's favored-nation clause and that respondent was not entitled to a price increase. The questions presented are:

1. Whether a court of appeals, on review of the order, may decide for itself the meaning of the favored-nation clause of respondent's contract or must accept the Commission's interpretation if reasonably supported.

2. Whether the favored-nation clause of respondent's contract provided for a price increase in these circumstances.

STATEMENT

1. Shell Oil Company, an independent producer of natural gas, sells gas produced in Southern Louisiana to the Texas Gas Transmission Corporation under a 20-year contract (the "Shell contract") executed in 1951 (R. 52).[1] After the decision in *Phillips Petroleum Co.* v. *Wisconsin,* 347 U.S. 672, holding sales of natural gas in interstate commerce by independent producers to be subject to the Natural Gas Act (52 Stat. 821, 15 U.S.C. 717, *et seq.*), the Federal Power Commission directed such producers to file rate schedules showing their rates in effect on June 7, 1954, the date of that decision (18 C.F.R. 154.91, *et seq.*). In November 1954, Shell duly filed, as part of its rate schedule, its contract with Texas Gas, together with, as required, a credit statement showing the rate actually being received on that date, which was 8.997 cents per Mcf (R. 81). Shell also filed, however, a "sample" billing statement purporting to show that the correct rate was 12.5 cents (R. 80). The Commission, in January 1955, notified Shell that it would not accept the filing until an explanation of the effective rate was provided (R. 161–162). Shell took no action until February 1957, when, in filing a new rate schedule prospectively changing its rate for the sale to 16.75 cents, it claimed that its effective rate on

[1] The contract was originally with Texas Gas' wholly-owned subsidiary, Louisiana Natural Gas Corporation. The corporations merged in June 1955 (R. 134).

June 7, 1954, was 12.5 cents by virtue of a price increase to which it had become entitled in 1953 under the "favored-nation" clause of its contract with Texas Gas (R. 116).

The Commission suspended the proposed 16.75-cent rate pending a determination of its reasonableness[2] and directed a hearing to determine the rate in effect on June 7, 1954 (R. 116–117). After hearings, the Commission determined that the effective rate in 1954 was 8.997 cents and directed that a revised billing statement so showing be filed with the contract as the rate in effect on June 7, 1954 (R. 133–143).[3] The court of appeals set aside the order, holding that the rate had been increased in 1953 under the favored-nation clause (*infra*, pp. 21–27).

2. Admittedly, the rate in effect under the contract prior to 1953 was 8.997 cents, and the sole question before the Commission and the court below was whether Shell had become entitled to an increase under its favored-nation clause in 1953. The facts relevant to that issue are as follows:

The favored-nation clause of the 1951 Shell contract provided (R. 63):

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[2] That proceeding is still pending before the Commission. The new rate (based upon another purchase of gas by Texas Gas admittedly within the favored-nation clause) went into effect after the expiration of the five-month suspension period, subject to the Commission's power to order refunds if the increased rate is ultimately found to have been unjustified. See § 4(e) of the Act, 15 U.S.C. 717c(e).

[3] The contract itself had been accepted for filing in the order directing the hearing, with only the filing of the required billing statement being held in abeyance (R. 116–117).

> 3. If at any time after December 31, 1951, Buyer [Texas Gas] shall enter into a contract providing for the purchase by it of gas produced from a field or fields located, and delivered to Buyer, within a radius of fifty (50) miles of any point of delivery provided hereunder, Buyer shall forthwith notify Seller [Shell] of such fact, and if the price per one thousand (1000) cubic feet at any time payable under such other contract is higher than the price payable hereunder, each price payable hereunder which is less than the price payable at the same time under such other contract shall be immediately increased so that it will equal the price payable under such other contract. * * *

At the time the Shell contract was made, Texas Gas was also buying gas in the same area from the Atlantic Refining Company under a 25-year contract (the "Atlantic contract") that had been executed on September 1, 1943.[4] That contract had fixed the rate to be paid during the first five years of the 25-year term and provided (R. 87–88):

> (b) At the end of the first five-year period, Buyer and Seller are to reach an agreement as to the price for gas sold and delivered under this contract during the second five-year period. The price to be paid during such second five-year period is to be agreed upon at the beginning of such period after a survey of prevailing

[4] The contract had initially been between Atlantic and the Defense Plant Corporation, but Texas Gas (through its subsequently-merged subsidiary) had acquired all the latter's rights on May 11, 1949 (R. 125).

> prices for gas being sold in similar quantities in the southwestern part of Louisiana.
>
> (c) During succeeding five-year periods, prices to be paid will be determined at the beginning of each period in the same manner as provided for in paragraph (b) above.
>
> (d) In the event that the parties are unable to agree upon the price to be paid for gas after the first five-year period, in accordance with the arrangements set forth in paragraphs (b) and (c) above, such determination shall be submitted to arbitration in accordance with Condition XII.[5]

Both the 1948 and the 1953 price redeterminations under that provision were agreed upon without resort to arbitration, the price fixed for the period beginning September 1, 1953, being 12.5 cents per Mcf.[6]

Shell contended that by agreeing to the 1953 price redetermination under the Atlantic contract Texas Gas had, after 1951, "enter[ed] into a contract providing for the purchase by it of gas" within the meaning of the Shell contract. Accordingly, it claimed to be entitled to an increase of its rates to the same level under the favored-nation clause of its contract.

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[5] Condition XII (R. 93–94) was a typical arbitration provision calling for the appointment by each party of one arbitrator and the selection of a third by the two so appointed or, if they failed to agree, by a designated judge. If either party failed to appoint an arbitrator, the other party's appointee was to be sole arbitrator. The decision of the arbitrators was to be "final and conclusive."

[6] R. 37, 138. The second price redetermination was not actually agreed upon until February 17, 1954, but, since it became effective in 1953, will be referred to as the 1953 redetermination.

3. Noting that the provision for arbitration made the price-redetermination provisions of the Atlantic contract definite and enforceable, the Commission, reversing its examiner (R. 124–132), held that the 1953 redetermination agreement was but action which Texas Gas was obligated to take under its pre-existing contract with Atlantic and was not the entering of a new contract for the purchase of gas within the meaning of the Shell favored-nation clause (R. 137–142, 155–158). In support of that interpretation of the Shell contract, the Commission, in its order denying rehearing, noted the numerous examples in the record of other contracts—to which Shell itself was a party—containing favored-nation clauses which, in contrast to the clause used here, were not limited in operation to higher prices paid under new contracts but were by their express terms equally applicable to price increases given under pre-existing contracts (R. 157–158).[7]

4. The court of appeals vacated the Commission's order and remanded the case to the Commission, holding that the 1953 Atlantic price redetermination had entitled Shell to a price increase under its favored-nation clause (*infra*, pp. 21–27).[8] Although as-

[7] As an alternative ground, the Commission also held that the price which Shell was in fact receiving on June 7, 1954, was its effective rate as of that date. That ground was abandoned in the court below in light of the court's intervening contrary decision in *Natural Gas Pipeline Co.* v. *FPC*, 253 F. 2d 3 (C.A. 3), certiorari denied, 357 U.S. 927.

[8] The remand was to determine the precise amount, if any, by which the Atlantic redetermined price exceeded the Shell rate, taking into account other terms of the sales bearing on the comparability of the rates (*infra*, p. 27).

suming for purposes of decision that the Atlantic contract was enforceable and thus a "binding agreement-to-agree" (*infra*, p. 26), the court held (*infra*, pp. 25–26):

> * * * the fact cannot be avoided that, at least for purposes of the favored nation clause, the "entering of a contract for the purchase of gas" has not been accomplished until the price has been established. True, Atlantic was obligated to deliver gas for twenty years from 1943 but, just as important, Louisiana was bound to pay for it. And while there may have been enforceable means for settling the rate of payment in the event the parties could not agree, it would nonetheless be true that it was when the price was finally established, by whatever means, that a contract had thereupon been entered. Actually, if the Louisiana-Atlantic agreement of February 17, 1954, was not an entering of a contract we are at a loss as to how it would be properly and legally characterized. The situation fits best into the rubric of an accord itself taken as satisfaction. See 6 Williston on Contracts, §§ 1841, 1846 (rev. ed. 1938). Both parties gave up their rights under the original contract to proceed to arbitration, promising on the one side to pay and on the other side to accept the price reached.

REASONS FOR GRANTING THE WRIT

The Shell contract provided for a corresponding price increase "If at any time after December 31, 1951, Buyer [Texas Gas] shall enter into a contract providing for the purchase by it of gas" at a higher price. The Commission interpreted that provision

as not applying to a price redetermination under a pre-1952 contract. The court of appeals, without finding that the Commission's interpretation was unreasonable or unsupported by the evidence, reached the opposite conclusion. Whether the court of appeals could thus decide for itself the meaning of the Shell contract—presumably because a question of contract interpretation is often said to be a question of "law"—raises problems of major importance in the administration of the Natural Gas Act.

1. This Court has increasingly recognized the inadequacy of the law-fact distinction as the determinant of the allocation of functions between court and agency and has looked instead to such considerations as the desirability of uniformity, the bearing of the agency's specialized knowledge upon resolution of the question, and the implicit purposes of the statute.[9] Upon such considerations, even some questions of statutory interpretation have been left to administrative agencies with but limited review by the courts.[10] That questions of contract interpretation are for some purposes characterized as questions of law is,

[9] Cf. *Far East Conference* v. *United States*, 342 U.S. 570, 574–575; *United States* v. *Western Pacific R. Co.*, 352 U.S. 59, 64–65.

[10] See, *e. g.*, *National Labor Relations Board* v. *Hearst Publications*, 322 U.S. 111 ("employees"); *Shields* v. *Utah Idaho Central R. Co.*, 305 U.S. 177 ("interurban railway"); *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 ("bituminous" coal); *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125 ("control" of a company); *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U.S. 251 ("member of the crew"); *Unemployment Compensation Commission* v. *Aragon*, 329 U.S. 143 ("labor dispute in active progress"). See Jaffe, *Judicial Review: Question of Law*, 69 Harv. L. Rev. 239.

therefore, not determinative, and the controlling consideration is rather that the interpretation of filed rate contracts is a function which the Commission, because of its intimate familiarity with the business and contracting practices of the industry,[11] is far better equipped to perform than are the courts.

Whatever doubt there may once have been[12] as to the respective roles of the Commission and the courts

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[11] Even the court of appeals, though perhaps unwittingly, recognized the importance of such factors by invoking, in support of its interpretation, its own notions of the "usual objective" of such clauses, the practical reasons for including such a clause and the likely intention of the parties to be inferred therefrom, and the "business practicalities" bearing on the question (*infra*, pp. 25, 26). It was, we submit, clearly improper for the court to make such inferences of industry practices for itself, and if it considered the Commission's interpretation not adequately supported by the language of the contract and other evidence relied on by the Commission, the proper course would have been to remand the case to the Commission for further findings. As we shall show (*infra*, pp. 14–17), however, the clause was not at all ambiguous to one versed in the usages of the industry, and there was in fact no need for further findings by the Commission.

[12] The doubt seems to have been generated by cases holding that the courts may interpret for themselves railroad tariffs filed with the Interstate Commerce Commission. *E.g.*, *Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U.S. 285. Those cases, however, did not involve review of ICC interpretations but rather original court actions to recover overcharges, the issue being whether the question of interpretation, though not within the ICC's original jurisdiction, should nevertheless be referred to it for decision. From those cases it does not follow that, when an agency has in fact passed upon a question of contract interpretation arising in a matter within its original jurisdiction, a reviewing court may ignore the agency's determination and decide the question for itself. Compare *United States* v. *ICC*, 198 F. 2d 958 (C.A.D.C.), certiorari denied, 344 U.S. 893, where the court, in *reviewing* an ICC

in the interpretation of filed rate contracts has, we submit, been resolved by this Court's recent decision in *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division,* 358 U.S. 103. In that case, the Commission had interpreted a filed rate contract as authorizing unilateral rate changes and had accepted such a change for filing. The court of appeals set aside the order without reaching the contract-interpretation question. This Court, reversing, deemed it unnecessary to remand the case to the court of appeals for consideration of that question since it involved "matters peculiarly within the area of the Commission's special competence and as to which we could hardly be aided by a further examination of the record by the Court of Appeals" (p. 114). Proceeding itself to the interpretation question, the Court held (*ibid.*):

---

interpretation of a tariff (in a reparations proceeding), asserted only a limited review power (pp. 963–964) and, finding the interpretation not adequately supported (pp. 965–968), remanded the issue to the ICC for further consideration (p. 975). Moreover, the Court has recently limited the *Great Northern* line of cases by requiring issues of tariff construction which may turn upon familiarity with underlying rate-making factors to be referred to the ICC even when they arise initially in an original action at law. *United States* v. *Western Pacific R. Co.*, 352 U.S. 59.

In other areas, analogous questions of the scope of review of administrative interpretations of contracts have seldom arisen and, when present, have received little recognition. See, *e.g.*, *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270, 279–284, where the Court may have interpreted a no-strike provision of a collective-bargaining agreement for itself, noting only that the concurrent interpretation of the provision by the Board and the court of appeals, which it affirmed, was "entitled to much weight" (p. 281).

> After scrutinizing the record we are satisfied that the Commission's determination as to the meaning of the service agreements here involved was amply supported both factually and legally. There is no necessity for us to embark upon a detailed discussion of the various contentions made by the parties, none of which appears to have been overlooked or misapprehended by the Commission. * * *

The Court then limited its discussion of the issue to a brief mention of some of the factors supporting the Commission's interpretation.

The disposition of the contract-interpretation question in the *Memphis* case necessarily means, in our view, that the interpretation of filed rate contracts is for the Commission and its interpretation, if reasonably supported, must be accepted by the courts. If that view of the *Memphis* decision be correct, the decision below is in square conflict and should be reversed. If, on the other hand, the implications of the *Memphis* decision remain in doubt, this case affords an opportunity for a restatement and clarification of the relationship of the Commission and the courts in the interpretation of gas sales contracts filed with the Commission as rate schedules.

2. The question is not only important generally in the field of administrative law but is of particular importance to the administration of the Natural Gas Act. Over 10,000 basic contracts of independent producers have already been filed with the Commission as rate schedules, and each of them potentially presents questions of contract interpretation to be resolved by the Commission—*e.g.*, to determine whether a purported

initial rate or change of rates should be accepted for filing. The contracts are typically long, complex, and technical and reflect the industry practices that have grown up to deal with problems peculiar to the industry, making the Commission's accumulated experience and insight of special significance in their interpretation. In addition, because of the specialized nature of the industry, many of the contracts contain substantially identical provisions, and the uniformity that can be achieved by committing their interpretation to a single agency is therefore a primary desideratum.

It is important, moreover, that the question be promptly resolved. The Commission has already had before it numerous cases involving questions of contract interpretation,[13] and the problem of the proper scope of review of its resolution of such questions will recur with increasing frequency. So long as the apparent conflict between the decision below and that in *Memphis* remains unresolved, parties dissatisfied with the Commission's interpretation of a contract can

[13] See, *e.g.*, *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 358 U.S. 103; *Nevada Natural Gas Pipe Line Co.* v. *FPC*, decided May 27, 1959 (C.A. 5, Nos. 17074, *et al.*); *Cities Service Gas Producing Co.* v. *FPC*, 233 F. 2d 726 (C.A. 10), certiorari denied, 352 U.S. 911; *Phillips Petroleum Co.* v. *FPC*, 227 F. 2d 470 (C.A. 10), certiorari denied, 350 U.S. 1005; *Phillips Petroleum Co.* 21 F.P.C. 167, petition for review pending (C.A. 10, No. 6154). Numerous pending cases also appear to present such questions. *E.g.*, *Pure Oil Co.*, Docket No. G-17930; *Phillips Petroleum Co.*, Docket No. G-10908; *Phillips Petroleum Co.*, Docket No. G-1148, and related cases, Docket Nos. G-16117, G-11217, Examiner's Decision issued April 6, 1959, pp. 304–308; *Phillips Petroleum Co.*, Docket No. G-14115.

hardly be expected not to seek a *de novo* interpretation from a court of appeals.

3. The Commission's interpretation of the Shell contract was patently a reasonable one and should, therefore, have been accepted by the court of appeals whether or not its own, and contrary, interpretation might also have been reasonable.

The essential consequence of a limitation of a favored-nation clause to prices paid under new contracts is that the purchaser thereby retains control over its obligations under the contract—*i.e.*, it can control the event that will trigger a price increase. If a proposed new purchase of gas in the area will, by triggering price increases under existing contracts, be too costly, the purchaser may forego expansion or seek supplies in another area not covered by the favored-nation clauses. Under favored-nation clauses not limited to new contracts, the purchaser does not retain that control: when a seller under an old contract becomes entitled to a price increase under the provisions of its contract, the favored-nation seller automatically becomes entitled to the same increase; in effect, all the price-increase provisions of the buyer's existing contracts are made applicable to the favored-nation seller.

The limitation of a favored-nation clause to new contracts is equally understandable from the point of view of the seller. At the time of contracting, the seller can bargain directly for substantive concessions in its own contract similar to those in the buyer's existing contracts with other producers. Its claims for parity vis-à-vis other existing contracts

can thus be directly negotiated and compromised, so that only the function of assuring equality with future contracts, the terms of which cannot then be known, need be left to the favored-nation clause.

To the Commission, with its familiarity with the kinds of favored-nation clauses used in the industry and the nature of the bargains they reflect, those distinctions (pointed out by the Commission's comparison of the clause here with other clauses not so limited (R. 157–158)) were apparent and the interpretation of the clause here posed no difficulty. Whatever its legal classification, the price redetermination under the Atlantic contract was but the fulfillment of a fixed obligation antedating the Shell contract. Accordingly, it was not a "contract providing for the purchase * * * of gas" entered into after the Shell contract within the meaning and purposes of the Shell favored-nation clause.

4. For the above reasons, we think it beyond dispute that the Commission's interpretation was reasonably supported and therefore binding on the court of appeals under the proper standard of review. We further suggest, however, although we do not think the Court need reach the question, that the court of appeals' decision was erroneous even if it was open to it to interpret the contract for itself.

Ultimately, the court's decision rests on the syllogism that the Atlantic price redetermination was reached by agreement of the parties rather than by arbitration; that such an agreement is a "contract"; that the "purchase" of gas could not be completed

until the price was established; and that therefore the price redetermination was a "contract providing for the purchase * * * of gas" entered into after the specified date. But just as the syllogism plays along the surface of the words, so the result is divorced from any purpose that could reasonably be attributed to the parties to the Shell contract.

Looking to the possible purposes of the parties to the Shell contract—rather than to the technical characterization of the legal phenomena occurring under the Atlantic contract—it becomes clear, we submit, that it was a matter of total unconcern to Shell whether the prevailing price which Texas Gas was obligated by an existing contract to give to another seller was to be determined by reference to an established price index or, because of the difficulty of agreeing upon a proper index, by negotiation subject to arbitration. So also, it could not matter to Shell whether Atlantic and Texas Gas were able to agree upon the prevailing prices or were forced to submit the matter to arbitration. The disparity of treatment between Shell and the other seller is the same regardless of the mechanics by which the other seller's price increase is determined, and a construction of the Shell contract which makes Shell's right to an equivalent increase turn upon such distinctions [14]

[14] There is a suggestion in the opinion below that Shell would be entitled to a price increase in all cases, "possibly" excepting only the case where the existing contract provided for a price increase in a pre-determined amount (*infra*, p. 25). That suggestion is, if anything, even more untenable, since it was only by virtue of the "agreement" on the price increase that the court was able to find a post-1951 "contract" of any kind. An

can only be unsound. The controlling fact is that the price increase given to Atlantic was one that Texas Gas was obligated by a pre-existing contract to give, and it is immaterial whether the precise amount of the increase was fixed by agreement or arbitration.[15]

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automatic price increase determined by a price index or by arbitration could not properly be described as the entering of a contract for the purchase of gas. And if it could, there would then be no difference at all between an unlimited favored-nation clause and one limited to new contracts.

[15] In the proceedings below, Shell's major contention was that the Atlantic contract was unenforceable because of the lack of a price standard. Although the redetermination provision—providing only that the price was to be "agreed upon * * * after a survey of prevailing prices" in the area, with a failure to agree to be resolved by arbitration—was inartistically worded, the obvious meaning was that the "prevailing prices" were not only to be surveyed but were also to provide the standard for the price to be determined. See R. 13–17. But while we think there is no doubt of the enforceability of the Atlantic contract, that issue is, we submit, immaterial in any event. The parties treated the contract as binding and complied with it, and it is not for Shell, a stranger to the contract, to say that it was not legally enforceable. In limiting the favored-nation clause to future contracts, Shell and Texas Gas were dealing with a practical distinction between existing and future supply arrangements, not with a distinction between contracts which would or would not survive a law suit.

However, even should this Court disagree that the question is immaterial, it would not be required to decide the enforceability of the Atlantic contract. The court of appeals assumed that it was enforceable for purposes of its decision, and it is that decision that presents the questions of general importance of which review is sought. Should the Court reverse that decision, it could then—if it considered the question material—remand the case to the court of appeals to determine the enforceability question.

5. While the scope of judicial review is the question of primary importance presented by this case, the proper interpretation of the favored-nation clause itself has a significance far beyond that normally implicit in such questions. As we have noted, there is a large measure of uniformity of contracting practices in the industry, and clauses similar to those involved here are in widespread use. Of 3320 contracts of independent producers in the Louisiana and Texas Gulf Coast area examined by the Commission staff, 580 (17%) had favored-nation clauses of the new-contract type.[16] On the other hand, 28.8% of the contracts in that area (at a somewhat earlier date) contained price-redetermination clauses.[17] While there are of course great variations in the specific wording of those clauses, an attempt was made to count only those new-contract favored-nation clauses and those price-redetermination clauses which, upon interaction, would present substantially the same problem as that presented here. There are, in fact, already pending before the Commission at least four proceedings involving an equivalent issue.[18]

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[16] Another 965 (29%) had favored-nation clauses not so limited. The survey included all the contracts of the producers in that area with the 13 major pipelines on file as rate schedules as of the spring of 1959.

[17] Based on the 1547 contracts of producers in that area with the major pipelines on file as of December 1, 1955. For the United States as a whole, of 7,291 producer contracts with interstate pipelines on file as of June 30, 1956, 1800 (24.7%) had redetermination clauses.

[18] *William Herbert Hunt Trust Estate*, Docket No. G–18091; *H. L. Hunt*, Docket No. G–18092; *Hassie Hunt Trust*, Docket No. G–18093, order issued March 20, 1959; *The Atlantic Refining Co.*, Docket No. 18752, order issued June 17, 1959.

Prior to this case, it was, we believe, commonly accepted in the industry that a typical new-contract favored-nation clause was not triggered by a price redetermination under a pre-existing contract.[19] Thus, even if distinctions based on the particular wording of the contracts will in some cases be possible or other courts of appeals decline to follow this case, the decision below has upset the established understanding in the industry and will breed extensive, and in our view unwarranted, litigation.

Finally, the hospitable scope given to new-contract favored-nation clauses by the court below, particularly if followed by other circuits, will inevitably cause substantial increases in the field prices of gas and thus, ultimately, in consumer prices. Because price increases under favored-nation clauses bear no relation to the producer's costs or financial needs, such clauses have little place in a regulated industry, and several proposals have been made to outlaw them or restrict their operation. *E.g.*, H.R. 366, 86th Cong., 1st Sess.; H.R. 8525, 85th Cong., 1st Sess. Even if otherwise lawful, however, such clauses should be strictly con-

[19] Even Shell, after asserting without explanation a right to a 12.5 cent rate in its initial filing in November 1954, seems to have thought so little of the claim that it failed to press it before the Commission until February 1957, in the meantime, at least after April 1955 (R. 7–10, 46–47), accepting without question or reservation the 8.997 cent rate being paid to it by Texas Gas (R. 39–52). The genesis of Shell's claim, moreover, seems to have been primarily a belief that the enforceability of the Atlantic contract might be successfully attacked (see note 15, *supra*), rather than any doubt as to the meaning of the Shell contract.

strued, and there is no warrant for a construction giving to producers, at the expense of consumers, a windfall which, if industry understanding be a guide, was neither contemplated nor bargained-for.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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JULY 1959.

APPENDIX

United States Court of Appeals
For the Third Circuit

No. 12,568

SHELL OIL COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT, TEXAS GAS TRANSMISSION CORPORATION, INTERVENOR, AND LOUISVILLE GAS & ELECTRIC COMPANY, INTERVENOR.

ON PETITION TO REVIEW AN ORDER OF THE FEDERAL POWER COMMISSION

Argued October 6, 1958

Before GOODRICH, MCLAUGHLIN and STALEY, *Circuit Judges.*

OPINION OF THE COURT

(Filed January 27, 1959)

By MCLAUGHLIN, *Circuit Judge.*

This case is another in that line wherein the issue has been the effective rate on June 7, 1954 for natural gas sold by a so-called independent producer. That date was when the Supreme Court announced its

decision in Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 (1954). The effect of that decision was to subject independent producers of natural gas to regulation by the Federal Power Commission. The Commission, in implementing the decision, called for filing of rate schedules setting forth "* * * rates * * * effective on June 7, 1954."

What that rate was for Shell Oil Company in its contract with Louisiana Natural Gas Company [1] depends upon the contract-established provisions rather than on the fortuity of rates which were being actually paid on that date. See Natural Gas Pipeline Company v. Federal Power Commission, 253 F. 2d 3 (3 Cir. 1958), cert. den. 357 U.S. 927 (1958). The contract had been entered on May 1, 1951 and for the period in question provided for the sale of gas at 8.997¢ per Mcf, unless "* * * at any time after December 31, 1951, Buyer [Louisiana] * * * [should] enter into a contract providing for the purchase by it of gas * * *" produced and delivered within a fifty mile radius of any delivery point specified. In that event the contract price was to escalate to the same price as that called for by the subsequent contract with the other producer.

Louisiana had already succeeded to rights as purchaser under a contract entered with Atlantic Refining Company, another producer, in 1943. Under that contract buyer agreed to buy specified daily quantities of gas; it was provided that the rights of the parties should continue for the producing life of the field involved but for not more than twenty-five years. In that contract the buyer agreed to pay 2.2¢ net per Mcf for gas received for the first five

[1] Louisiana Natural Gas Company was a subsidiary of Texas Gas Transmission Corporation. On June 30, 1955 it was merged into the parent corporation.

years. No fixed price was established for periods after that, but rather the contract provided:

> "(b) At the end of the first five-year period, Buyer and Seller are to reach an agreement as to the price for gas sold and delivered under this contract during the second five-year period. The price to be paid during such second five-year period is to be agreed upon at the beginning of such period after a survey of prevailing prices for gas being sold in similar quantities in the southwestern part of Louisiana.
>
> "(c) During succeeding five-year periods, price to be paid will be determined at the beginning of each period in the same manner as provided for in paragraph (b) above.
>
> "(d) In the event that the parties are unable to agree upon the price to be paid for gas after the first five-year period, in accordance with the arrangements set forth in paragraphs (b) and (c) above, such determination shall be submitted to arbitration in accordance with Condition XII."[2]

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[2] Condition XII reads:

"* * * The party desiring such arbitration shall notify the other and in such notice shall name an arbitrator, (sic) ,the arbitrator to be appointed by the other party shall be named within ten (10) days after receipt of such notice of arbitration, and an additional arbitrator shall, within ten (10) days of the appointment of the second arbitrator, be selected by the two (2) arbitrators theretofore appointed, but if one of said parties shall have failed to appoint an arbitrator within the time provided herein, it is expressly understood and agreed that the sole arbitrator shall arbitrate the question alone. If arbitrators shall have been appointed by the respective parties and shall have failed to select the third arbitrator within the above stated time, the third arbitrator shall be appointed by the senior Judge of the 5th Federal Judicial Circuit upon application therefor by either of said parties to the arbitration.

"* * * The decision in writing signed by a majority of the arbitrators shall be final and conclusive with respect to the matter submitted and the parties hereto agree to accept and abide by the same."

r the second five year period had been
r negotiation between the buyer and seller,
eement expired on August 31, 1953. Loui-
tlantic undertook negotiations in Septem-
year for agreeing to a price for the third
riod.

es had difficulty in agreeing. The negotia-
ned five and a half months, finally culmi-
n agreement dated February 17, 1954,
price was established at 12.5¢ per Mcf,
ring tax. Shell thereafter accidentally
this and subsequently notified Louisiana
ntitled under its contract to an escalation
o the same 12.5¢ level.

no dispute that the fifty mile radius re-
f the Louisiana-Shell contract is satisfied.
nt concerning Shell's right to a higher price
ether the Louisiana-Atlantic agreement of
1954 was an "entering of a contract"
ated the price escalation clause of the
hell contract.

ell filed its rate schedule with the Federal
mission pursuant to the Commission's
menting the Phillips decision, the Com-
ther accepted or rejected the submitted
g further explanation by Shell of why
2.5¢ per Mcf. Shell presented that ex-
February, 1957 when it filed for an in-
e to 16.75¢ per Mcf. The reasonableness
is still awaiting hearing. The Commis-
point directed that a hearing be held to
e effective rate on June 7, 1954 under
ntract which it simultaneously accepted

lt of the hearing the examiner found the
e to be 12.5¢. This finding was subse-

quently reversed on November 12, 1957, by the Commission whose decision is here on appeal by Shell.

The clause in the Louisiana-Shell contract which is central to this controversy is one of the type commonly referred to in the trade as a "most favored nation" clause. The usual objective of such a clause is to assure the seller a top price for its gas. Testimony at the hearing before the Commission's examiner was that Louisiana had desired a twenty year contract which was for a term longer than Shell had at that time ever contracted for, at least in that area. Because of difficulty in establishing a price for so long a period, the clause in question was agreed upon. It appears that at the time of contracting Shell knew Louisiana was purchasing gas from Atlantic but was not familiar with the specific terms of that contract. These facts tend strongly to demonstrate that the intention of the parties was for any higher price paid by Louisiana to another producer to trigger a rise on the Shell contract to the same figure except possibly where a pre-existing contract already provided for a settled step-up in price.

If the precise arrangement under the Atlantic contract had been known to Shell, then perhaps Louisiana could argue to more purpose that the wording of the Shell contract (which calls for the "enter[ing of] a contract providing for the purchase * * * of gas") was not intended to trigger escalation following an agreement on price when that agreement was reached under an earlier gas purchase contract which contained a binding agreement subsequently to agree on price. But even then the fact cannot be avoided that, at least for purposes of the favored nation clause, the "entering of a contract for the purchase of gas" has not been accomplished until the price has been estab-

lished. True, Atlantic was obligated to deliver gas for twenty years from 1943 but, just as important, Louisiana was bound to pay for it. And while there may have been enforceable means for settling the rate of payment in the event the parties could not agree, it would nonetheless be true that it was when the price was finally established, by whatever means, that a contract had thereupon been entered. Actually, if the Louisiana-Atlantic agreement of February 17, 1954, was not an entering of a contract we are at a loss as to how it would be properly and legally characterized. The situation fits best into the rubric of an accord itself taken as satisfaction. See 6 Williston on Contracts, §§ 1841, 1846 (rev. ed. 1938). Both parties gave up their rights under the original contract to proceed to arbitration, promising on the one side to pay and on the other side to accept the price reached.

To make the date of the accord retroactive to the date of the original agreement-to-agree is, of course, abstractly conceivable; but for a court to attribute that effect to the Atlantic contract and apply it to the Shell contract in the absence of recognition of this possibility in the Shell contract would take the law out of the realm of business practicalities. It is far more in line with the realities of the situation to say that complete performance of the 1943 contract required the parties to enter into subsequent contracts. The entering into one of those subsequent contracts triggered the escalation clause in the Shell agreement.

We have assumed without deciding that the Atlantic contract of 1943 did in fact impose a binding agreement-to-agree on the price for gas in each of the contract's last four five year periods. Thus it has not been necessary to determine the several ques-

tions raised in connection with the arguments directed to that phase of the case. Of course if the Atlantic contract of 1943 was not a binding agreement-to-agree, that circumstance alone would place the February, 1954 Atlantic contract fully within the terms of the escalation clause in the Shell contract.

The Federal Power Commission order of November 12, 1957 finding Shell's rate with Louisiana on June 7, 1954 to be 8.997¢ per Mcf will be vacated. Because the escalation called for by the contract requires consideration of other factors in determining whether the price to another supplier was indeed higher, the cause will be remanded for consideration of those factors.

United States Court of Appeals for the Third Circuit

No. 12,568

SHELL OIL COMPANY, PETITIONER,

vs.

FEDERAL POWER COMMISSION, RESPONDENT, TEXAS GAS TRANSMISSION CORPORATION, INTERVENOR, LOUISVILLE GAS & ELECTRIC COMPANY, INTERVENOR

JUDGMENT

Present: GOODRICH, MCLAUGHLIN and STALEY, *Circuit Judges:*

This cause came on to be heard on the record from the Federal Power Commission, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of November 12, 1957 of the Federal Power Commission be, and it is hereby vacated, and the cause remanded with directions to proceed in conformity with the opinion of this Court.

JANUARY 27, 1959.

United States Court of Appeals for the Third Circuit

No. 12,568

SHELL OIL COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT, TEXAS GAS TRANSMISSION CORPORATION, INTERVENOR, AND LOUISVILLE GAS & ELECTRIC COMPANY, INTERVENOR

Present: GOODRICH, MCLAUGHLIN and STALEY, *Circuit Judges:*

ORDER

The petitions for rehearing of Federal Power Commission, Texas Gas Transmission Corporation and Louisville Gas & Electric Company in this case are denied.

By the Court,

[s] MCLAUGHLIN,
Circuit Judge.

Dated: MARCH 4, 1959.

Received and filed Mar. 5, 1959. Ida O. Creskoff, Clerk.

AUG 31
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

Nos. 167 and 170.

TEXAS GAS TRANSMISSION CORPORATION and LOUISVILLE GAS AND ELECTRIC COMPANY, *et al.*,

Petitioners,

v.

SHELL OIL COMPANY,

Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF SHELL OIL COMPANY IN OPPOSITION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

Nos. 167 and 170.

TEXAS GAS TRANSMISSION CORPORATION and LOUISVILLE GAS AND ELECTRIC COMPANY, *et al.*,

Petitioners,

v.

SHELL OIL COMPANY,

Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF SHELL OIL COMPANY IN OPPOSITION.

Opinion and Orders Below.

The opinion of the Court of Appeals (Appendix A hereto) is reported at 263 F. 2d 223. The order of the Commission (R. 133-145)[1] appears at 18 F. P. C. 617; its denial of rehearing (R. 153-162) is reported at 19 F. P. C. 74. The decision of the Presiding Examiner is in the record (R. 118-133).

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[1] References are to the page numbers shown at the bottom of the pages of the Joint Appendix.

Questions Presented.

This case involves a contract dispute between the parties a privately negotiated gas sale contract. The dispute nters on whether the price escalation clause in a 1951 ntract between Shell Oil Company (Shell), as seller, and ouisiana Natural Gas Company (Louisiana),[2] as buyer, as activated prior to June 7, 1954 by an agreement dated ebruary 17, 1954 between Louisiana and Atlantic Refining ompany (Atlantic).

The price escalation clause in Shell's 1951 gas sale ntract becomes "immediately" operative should the uyer thereafter "enter into a contract providing for the urchase by it of gas" at a higher price within a desigated area. In February 1954, Louisiana entered into a egotiated agreement with another producer (Atlantic) greeing upon the price to be paid Atlantic for gas proced from the area designated in the Shell clause. This 54 agreement resulted from a prior arrangement which, r each five year period after the first five years, required The price . . . to be agreed upon . . . after a survey of evailing prices for gas being sold in similar quantities the southwestern part of Louisiana" (R. 87-88), and iling agreement, to submit the matter to arbitration. A spute arose between Shell and the buyer as to whether e February 1954 agreement was a contract which activated the Shell price clause.

Pursuant to the Commission's regulations requiring oducers' contracts to be filed as "rate schedules",[3] Shell

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[2] In 1955, Louisiana was merged into its parent, Texas Gas ansmission Corporation, a petitioner here.

[3] 18 C.F.R. 154.91, *et seq.*

so filed its 1951 contract claiming as its initial (June 7, 1954) price, the same price as that fixed in the Louisiana-Atlantic agreement of February 1954.[4] Upon being apprised of the details of the dispute between Shell and the buyer, the Commission convened a hearing for the purpose of determining Shell's "properly effective" June 7, 1954 price. The Presiding Examiner held that the February 1954 agreement was a contract for the purchase of gas which activated the Shell clause (R. 132-133).[5] The Commission reversed its Examiner and held that said agreement was not a "completely new" contract but merely represented action taken pursuant to a pre-existing contract.

The Court of Appeals unanimously held that the February 1954 agreement was a contract which activated the Shell clause. The Court vacated the Commission's order and remanded the cause to the Commission to ascertain whether the price in the February 1954 contract was indeed higher than the Shell price.

The questions presented are:

1. Whether the Court of Appeals was correct in holding that the February 1954 agreement constituted the entering of a contract for the purchase of gas which activated the Shell price clause?

2. Whether in a review proceeding under Section 19(b) of the Natural Gas Act (52 Stat. 821, 15 U. S. C. 717, *et seq.*, see Appendix B herein), the Court of

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[4] Absent escalation Shell's initial price would be 8.997¢ per Mcf; as escalated it is 12.5¢ per Mcf, both plus tax reimbursement. The 12.5¢ price is the price fixed in the Louisiana-Atlantic agreement of February 1954.

[5] In addition to the Commission's staff, Texas Gas and Louisville (petitioners here) participated in the hearing and filed briefs. Those companies were intervenors in the Court of Appeals.

Appeals was precluded, in the circumstances of this case, from reaching a conclusion different from that reached by the Commission on the question of law involved?

Statement.

The 1951 Shell-Louisiana contract contains the following provision (R. 63-64):

> "If at any time after December 31, 1951, Buyer shall enter into a contract providing for the purchase by it of gas produced from a field or fields located, and delivered to Buyer, within a radius of fifty (50) miles of any point of delivery provided hereunder, Buyer shall forthwith notify Seller of such fact, and if the price per one thousand (1000) cubic feet at any time payable under such other contract is higher than the price payable hereunder, each price payable hereunder which is less than the price payable at the same time under such other contract shall be immediately increased so that it will equal the price payable under such other contract. In determining whether the price payable under such other contract is 'higher' than the price payable for gas under this contract, due consideration shall be given to the provisions of this contract as compared with such other contract as to quality of gas, delivery pressures, gathering and compressing arrangements, quantity, provisions regarding measurement of gas, including deviation from Boyle's Law, taxes payable on or in respect of gas delivered and all other pertinent factors."

Prior to entry into the Shell contract, Louisiana had succeeded to all rights and obligations as purchaser under a 1943 contract which had originally been entered into between Atlantic, as seller, and Defense Plant Corporation,

as buyer (R. 81). Under this 1943 Defense Plant contract, "Seller *agrees to sell*" and "Buyer *agrees to buy*" and pay for certain specified *daily* quantities of gas (R. 82-83).[6] The contract fixes the price for only 5 years (R. 86). No price is fixed subsequent to the first 5 years, nor does this 1943 contract provide a formula or standard by which the parties or the arbitrators shall fix the price. Rather, the contract provides (R. 87-88):

> "(b) At the end of the first five-year period, Buyer and Seller are to reach an agreement as to the price for gas sold and delivered under this contract during the second five-year period. The price to be paid during such second five-year period is to be agreed upon at the beginning of such period after a survey of prevailing prices for gas being sold in similar quantities in the southwestern part of Louisiana.
>
> "(c) During succeeding five-year periods, prices to be paid will be determined at the beginning of each period in the same manner as provided for in paragraph (b) above.
>
> "(d) In the event that the parties are unable to agree upon the price to be paid for gas after the first five-year period, in accordance with the arrangements set forth in paragraphs (b) and (c) above, such determination shall be submitted to arbitration in accordance with Condition XII."[7]

Subject to the foregoing agreement on price at five year intervals, the "rights of the parties" are to continue

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[6] Italics supplied throughout.

[7] Condition XII reads (R. 93-94):

> "• • • The party desiring such arbitration shall notify the other and in such notice shall name an arbitrator, the arbitrator to be appointed by the other party shall be named

for the producing life of the field but not to exceed 25 years (R. 92).

The price for the period September 1, 1948 to August 31, 1953 (the second five-year period) had been agreed to by negotiations between Atlantic and the then buyer, by agreement dated February 16, 1949 (R. 102-107), but the price under this 1949 agreement expired on August 31, 1953 (R. 104). In the 1949 agreement the parties recited that they were carrying out their desire "that a new agreement be reached as to price" for the period ending August 31, 1953 (R. 103).

In September of 1953 (after the price fixed by the 1949 agreement expired) Atlantic and Louisiana undertook negotiations looking toward agreement upon price for the five-year term of September 1, 1953-August 31, 1958. They had considerable difficulty in reaching agreement. At least four meetings were held in which top representatives from each company attended, and there were numerous telephone conversations. Negotiations lasted approximately 5½ months (R. 12-13, 17-18). The representative of Atlantic (Mr. Bowser) who negotiated the 1943 Atlantic-Defense Plant contract as well as the 1954 Atlantic-Louisiana con-

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within ten (10) days after receipt of such notice of arbitration, and an additional arbitrator shall, within ten (10) days of the appointment of the second arbitrator, be selected by the two (2) arbitrators theretofore appointed, but if one of said parties shall have failed to appoint an arbitrator within the time provided herein, it is expressly understood and agreed that the sole arbitrator shall arbitrate the question alone. If arbitrators shall have been appointed by the respective parties and shall have failed to select the third arbitrator within the above stated time, the third arbitrator shall be appointed by the senior Judge of the 5th Federal Judicial Circuit upon application therefor by either of said parties to the arbitration.

"* * * The decision in writing signed by a majority of the arbitrators shall be final and conclusive with respect to the matter submitted and the parties hereto agree to accept and abide by the same."

tract testified without dispute that the 1943 contract did not contain a workable formula for ascertaining price (R. 11-13, 16-17). In describing the negotiations leading to the February 1954 contract, Mr. Bowser testified (R. 17):

> ". . . we finally haggled back and forth and said—they said, 'this is as high as we are going', and we said, 'Well, we will see if we can get that agreed to'. And discussed it with top management, reached an agreement, then drew the letter of agreement.
>
> "Q. Could you say you horse-traded it out? A. Oh, yes."

The agreement so reached between Louisiana and Atlantic is embodied in the February 17, 1954 contract which in pertinent part reads (R. 37-38):

> "In accordance with Paragraph III of said contract, (referring to the 1943 contract) it is hereby agreed that the price to be paid by Louisiana Natural Gas Corporation to The Atlantic Refining Company for gas sold and delivered under such contract between September 1, 1953, and August 31, 1958, both inclusive, shall be 12.2 cents net for each 1,000 cubic feet at a pressure base of 15.025 p.s.i.a. of gas received at the central point or points set forth in the original contract, regardless of whether such gas is delivered to a government plant or not; and, in addition, Buyer shall reimburse Seller for all State severance taxes, or similar taxes, which Seller is obligated to pay and has paid to the State of Louisiana on such gas."

The Vice President of Louisiana who participated in negotiating this contract, and who signed it for Louisiana, transmitted the agreement to Atlantic with a letter dated February 22, 1954, stating (R. 38-39):

> ". . . we are enclosing two (2) executed copies of letter *agreement* dated February 17, 1954, *covering the sale of gas,* Acadia Parish, Louisiana."

Shell thereafter accidentally learned of the February 1954 contract and notified Louisiana that it felt entitled to an escalation of its price (R. 7). Louisiana denied Shell's claim, hence the dispute giving rise to this proceeding.

As stated, the Court of Appeals and the Examiner reached a conclusion different from the Commission. The Court, however, remanded the cause to the Commission to consider whether the Atlantic price resulting from the February 1954 contract with Louisiana was indeed higher than the Shell price, as certain factors in that regard had not been reached by the Commission, although the Examiner had fixed Shell's price at the exact figure as the Atlantic price (R. 132-133).[8]

The Court of Appeals reached its decision upon concluding that the February 1954 agreement constituted the entering into a contract for the purchase of gas by Louisiana. This was one of the two main points briefed and argued before the Court. The Court "assumed without deciding" that the 1943 Atlantic-Defense Plant contract did impose a binding agreement-to-agree on price, hence the Court did not reach the "several questions raised in connection with the arguments directed to that phase of the case" (App. A, p. 6a). If certiorari were to be granted and this Court differ with the Court of Appeals, this other issue would still remain to be decided.

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[8] In 1957 Shell filed under §4(d) of the Act a rate increase to 16.75¢ per Mcf, plus tax reimbursement, resulting from another contract of the buyer. There is no dispute about Shell's contractual right to this escalation. However, this new rate has been suspended under §4(e) of the Act and is subject to a hearing thereunder as to its lawfulness. The instant proceeding does not involve that increase but deals solely with Shell's effective June 7, 1954 price. This question will, of course, affect the floor of Shell's price if the increase is ultimately disallowed.

ARGUMENT.

I.

Petitioners misconceive the nature of the price agreement clause of the 1943 Defense Plant contract by erroneously assuming it to be a redetermination clause for the purpose of fixing price increases.

Petitioners' argument is based upon a false premise.

Petitioners refer to the price agreement clause in the 1943 Atlantic-Defense Plant contract as a "*price redetermination*" clause. They characterize the lengthy negotiations between Atlantic and Louisiana leading to the February 1954 agreement as no more than a *price increase* effected under the *redetermination* clause.[9] This, we submit, is erroneous as it assumes that in reaching the February 1954 agreement, Atlantic and Louisiana did nothing more than apply a definite pricing formula or standard to come up with a price *increase*, and that failing agreement by the parties or a "majority" of the three arbitrators, the immediately preceding effective contract price would continue as the future contract price. But that is not so. A typical price *redetermination* clause in gas contracts is a clause dealing *solely* with price *increases*. It contains a definite standard by which the increase is to be ascertained, normally using the average of the three highest prices being paid by interstate transporters in a designated area; and it leaves the then contract price as the continuing price if such average does not exceed it. The Shell con-

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[9] The Commission's petition states (p. 17): "The *controlling* fact is that *the price increase* given to Atlantic was one that Texas Gas was obligated by a pre-existing contract to give, and it is immaterial whether the precise amount *of the increase* was fixed by agreement or arbitration." The petition of Texas Gas and Louisville (p. 15) refers to the action as "agreeing upon a *change* in the price, in accordance with an express provision of their . . . contract." We invite the Court's attention to the clause itself to see whether it obligated the giving of *an increase* or called for *a change*

tract, which is in the record, contains a typical price *redetermination* clause. To put these clauses in proper perspective, and to demonstrate their complete dissimilarity, they are set out side by side:

Atlantic Price Agreement Clause (R. 87-88).

"(b) At the end of the first five-year period, Buyer and Seller are to reach an agreement as to the price for gas sold and delivered under this contract during the second five-year period. The price to be paid during such second five-year period is to be agreed upon at the beginning of such period after a survey of prevailing prices for gas being sold in similar quantities in the southwestern part of Louisiana.

"(c) During succeeding five-year periods, prices to be paid will be determined at the beginning of each period in the same manner as provided for in paragraph (b) above.

"(d) In the event that the parties are unable to agree upon the price to be paid for gas after the first five-year period, in accordance with the arrangements set forth in paragraphs (b) and (c) above, such determination shall be submitted to arbitration in accordance with

Shell Price Redetermination Clause (R. 64).

"Seller may request a price redetermination for the period commencing January 1, 1962, . . . Such determination is to be made by the parties or, if they are unable to agree, by the arbitrators. . . . Upon such request, the parties, or the arbitrators, shall determine the three (3) highest prices to be paid during such period by operating interstate transporters of natural gas (within a given area) . . . and the prices to be paid during such period shall be the average of such three (3) highest prices per MCF; provided, that in no event shall the price per MCF hereunder be less, during the respective periods, than the price shown above for such period. . . ."

The difference between the clauses is obvious. We submit that petitioners confuse a price *redetermination* clause, pursuant to which price *increases,* gauged by a definite formula, are calculated by a simple arithmetic computation, with a unique and nondescript provision under which the contract price having completely expired, the parties agree to agree upon an entirely new price for their ensuing contract.

The nature of price redetermination clauses in gas contracts is recognized in legislation pending before Congress. H. R. 366, 86th Congress, 1st Session, §14(a)(3) provides:

> "The 'better market clause' or 'price redetermination clause' under the terms of which the price of the natural gas is or may be increased in the event the average of two or more prices which are paid by purchasers in a specified area is greater."

II.

By starting with a false premise, petitioners have overstated the importance and possible impact of the decision below.

Petitioners' confusion of the 1943 Defense Plant price agreement clause with a typical redetermination clause has led them erroneously to magnify this simple contract case into one of potential major significance. Their misreading of the clause has also led them to draw baseless conclusions from their post-hearing appraisal of other contracts on file with the Commission (Comm. Pet. p. 18; Texas Gas and Louisville Pet., pp. 6-8), and to forebode the impact which this case will have on others. It is true, of course, that there are many contracts on file with the Commission having typical price redetermination clauses of the type quoted above from the Shell contract. And it is also true that there are some contracts on file with the Commission which contain clauses similar to the Shell favored-nation

this case will govern the others. The reason it will not is that this case turns on whether the February 1954 agreement constituted entry into a contract for the purchase of gas. That agreement evolved from the peculiarity of the price agreement clause of the 1943 Defense Plant contract. Since that price agreement clause (which was used by the Defense Plant Corporation during its short sojourn into the gas purchasing business during World War II) is unique in the gas purchasing industry, the far-reaching impact and general importance which petitioners would credit to the decision below simply does not exist.[10]

We have searched the Commission's records of gas sale contracts in the Louisiana and Texas Gulf Coast area (the same area encompassed by the Commission Staff survey), *but we have been unable to find a single existing other Defense Plant contract of the type of the Atlantic-Defense Plant contract of 1943.* With the time at our disposal we have examined a substantial number of other contracts on file with the Commission but have been unable to find a single one containing a price agreement clause like that in the Defense Plant contract of 1943.[11] Therefore, this case

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[10] Our investigation reveals that Defense Plant entered into five contracts during World War II to supply natural gas to certain defense plants near Lake Charles, Louisiana. Only one, the Atlantic 1943 contract, survives. Shell was seller to Defense Plant in one of these old contracts. The instant Shell contract with Louisiana replaced Shell's Defense Plant contract (R. 52-53). It will be noted that this replacement contract has a fixed base price for its full term and did not leave future price to be agreed upon (R. 61-62). Louisiana took over one other contract from Defense Plant and later replaced it with another contract. This is the only other Louisiana (or Texas Gas) contract within a prescribed area including the 1943 Defense Plant contract which we have found which contains a favored-nation clause similar to that contained in the Shell contract. We have searched the Commission's records in vain to find where this other seller has asserted any rights as a result of the February 1954 Louisiana-Atlantic agreement. Any assertion at this late date of a different initial rate by such other seller would doubtless encounter serious obstacles as to its timeliness.

[11] There are a few contracts in which price for some future

cannot possibly have the far-reaching impact and general importance which petitioners would attribute to it.

An additional fallacy in the Commission's treatment of the statistics which it has compiled is that, while recognizing "great variations in the wording of those clauses" (p. 18), it says that it has considered those "new-contract favored-nation clauses and those price-redetermination clauses which *upon interaction*, would present substantially the same problem as that presented here" (p. 18). Thus, not only does the Commission's petition treat the price agreement clause in the 1943 Defense Plant contract as being a price redetermination clause (which it is not), and then assumes that clause to be identical to the large number of true redetermination clauses, but it goes beyond that and decides *ex parte* that there is an "interaction" which "would present substantially the same problem as that presented here" (p. 18). We submit that if a proper analysis were made and if the erroneous assumptions were discarded, the Commission's position in this regard would be found wanting.

The Defense Plant clause, we submit, clearly requires the creation of an entirely new price in order for the parties thereafter to stand as buyer and seller. When Atlantic and Louisiana created the contractual price by their agreement of February 17, 1954, they thereupon entered into a contract for the purchase of gas, thus completely satisfying the contract requirement portion of the Shell clause. And since the arrangement giving rise to the February 1954 contract is unique in the gas industry, the decision below has the sum total precedential value of one.[12]

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remains as the future contract price if agreement cannot be reached, thus making them nothing but price increase clauses; or the contract also contains a favored-nation clause (which the 1943 Defense Plant contract does not), under which the buyer is continuously obligated to pay the seller at least as high a price as the buyer pays any other producer in a designated area, and this clause appears to have been employed to fix the price.

III.

The Court of Appeals correctly decided that the Louisiana-Atlantic Agreement of February 1954 constituted entry by Louisiana into a contract for the purchase of gas, thus satisfying the Shell clause.

We are not concerned here with a specialized tariff or rate schedule prepared in accordance with standards prescribed by the Commission. Nor is there any question of a rate being just and reasonable. The sole question is whether a non-technically phrased escalation clause appearing in a privately negotiated contract has been activated by a subsequent privately negotiated agreement between the buyer and another producer-seller of gas. It is a type of question which courts would normally be expected to deal with as it involves the resolution of a pure issue of law. And that is the way the Commission treated it.

Pet., pp. 6-7). Each of these, but one, deals with price *increases* (not initial prices) arising under circumstances and contract wording entirely different from that involved here, and in each instance the increase has been suspended under §4(e) of the Act, thus if the increase is put into effect it will be subject to refund. The lone exception is *Phillips* (Docket No. G-10908) involving Phillips' June 7, 1954 rate where its price was to increase if the weighted average royalty rate in a given area exceeded a specified amount. Petitioners do not point to a single pending proceeding involving the issue involved here, and our independent review of the Commission's files fails to reveal any. Of course, the suspension and refund provisions of §4 of the Act fully protect against unjust or unreasonable rates flowing from the increases sought in the other proceedings cited by petitioners.

The Commission's petition (p. 19) and the petition in No. 167 (pp. 8-9) say that the decision below will result in substantial and unwarranted price increases to consumers. That is not the case. Aside from the isolated instance of this case which deals only with Shell's *initial* regulated price, future instances of the applicability of favored-nation clauses will be limited to price *increases* under §4(d) of the Act which will be subject to the suspension and refund provisions of §4(e), thus affording consumers full protection against unjust or unreasonable prices. Somewhat like, but more restricted than, the "superseding" rate schedule clauses involved in *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Div.*, 358 U. S. 103, the favored-nation clause is a mere contractual license

The Court of Appeals phrased the gist of this case thus (App. A, p. 4a):

> "The argument concerning Shell's right to a higher price *turns on* whether the Louisiana-Atlantic agreement of February 1954 was an 'entering of a contract' which activated the price escalation clause of the Louisiana Shell contract."

The Commission, in its order, posed the question before it to be (R. 149):

> "The question before us is whether the letter agreement (of February 17, 1954) constitutes a *new* contract for the purchase of gas or whether it merely represents action taken pursuant to the pre-existing 1943 Atlantic contract."

In its order denying rehearing, the Commission summarizes its order in these words (R. 153):

> "It was our view that the letter agreement (of February 17, 1954) was entered into pursuant to a continuing basic contract between Atlantic and Texas Gas' predecessors, so that it would not 'trigger' the escalation clause in Shell's contract as would *a completely new contract* between Texas Gas and a seller of natural gas. . . ."

Thus the Commission put into the Shell clause words which are neither there nor reasonably to be implied.[13] The Court of Appeals (and the Examiner) read the Shell clause as it is written and decided that the February 1954 agreement constituted entry into a contract for the purchase of gas. "Actually", said the Court, "if the Louisiana-Atlantic agreement of February 17, 1954 was not an entering of a contract we are at a loss as to how it would be properly and legally characterized" (App. A, p. 5a).

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[13] The petitioners likewise insist upon classifying the Shell clause as though it contained the word "new". We do not con-

itioners seem to disapprove of the Court's observa-
f the "usual objective" of price favored-nation
, although the use of price escalation clauses pre-
ur national independence.[14] But to us it does not
o extreme for an appellate judge to say what he
from his judicial experience and common sense to be
usual objective" of a price favored-nation clause
d in ordinary language.[15] Nor does the fact that
han 180 years after price escalation clauses came into
e of them happens to appear in a privately negotiated
et over which an administrative agency learned five
ago that it had jurisdiction, mean that the federal
ate courts have summarily lost their ability to read
lauses and say what they mean and what their *usual*
ve is. In this regard, we do not believe the adminis-
eye has suddenly become keener than the judicial.
observing that it was "abstractly conceivable" to
he February 1954 contract retroactively, the Court,
s to us, was merely announcing that it had given full
eration to the Commission's views, and that as an
et proposition it is sometimes conceivable to view a
et to be retroactively effective.[16] Thus, in some

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he earliest reference in this country to a price escalation which we have found appears in connection with the pur-
f rifles by the Province of Pennsylvania in 1776. In the *nited States Muskets, Rifles and Carbines* by Col. Arcadi
an (published by The Stockpole Co.) at pp. 44-46, appears a letter dated March 16, 1776 from Committee of Lancaster to Committee of Safety of Province of Pennsylvania, read-
part:

"With some difficulty we at length contracted with our Gunsmiths to supply us with Muskets, bayonets and steel rammers at L4-5s, agreeable to the Pattern set up here. Should the Philada. Prices of Work of equal quality exceed that sum, they were to be entitled to a like advance."

would be proper, we believe, for the Court to take judicial of the fact that the "*usual* objective" of a price favored- clause is to afford equal price treatment to the seller. We f no other objective the clause is designed to accomplish.

instances and for some purposes, a contract to sell a commodity which is subject to a condition precedent (such as fixing of price) might as a fiction, upon ripening into a sale when the condition is supplied, be said to be retroactive to the date of the contract to sell. But it would make an unreal thing of the law to employ that fiction in the circumstances of this case and thus defeat the fundamental coverage of a price favored-nation clause.

Petitioners indicate the view that the 1943 contract contained a definite standard for ascertaining price. Not even the Commission's order purports to go this far. Before the Court of Appeals, the Commission itself was of the view that the 1943 contract did not contain a definite formula or standard, for in its brief there it stated at page 21:

> "Since no fixed price was provided by the Atlantic contract, the arbitration clause was necessary if the contract was not to be merely 'an agreement to agree' ".

The undisputed testimony of the Atlantic official who negotiated the clause is clear that it did not contain a formula[17] (R. 16-17), and the action of the parties shows that in reaching the February 1954 agreement they employed nothing but their unfettered bargaining powers and traded out on a price after negotiating over a period of 5½ months (R. 17-18).

We submit that the decision of the Court of Appeals was correct and there is no need for its review by this Court. We further submit that this is not a case of general

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ing of the Shell clause called only for entry by the buyer into a contract for the purchase of gas, and that the case "turns on" whether the February 1954 agreement constituted entry into such contract.

[17] The Commission's petition (p. 17, fn. 15) says the Defense Plant contract provided a standard, thus apparently changing the view it held when writing its brief for the court below. The other petitioners (p. 15, fn. *) say our own witness testified the contract contained a definite standard. In addition to the wording of the [illegible] Court is requested to read the testimony of the

importance but, in reality, is nothing more than a contract dispute between Shell and Texas Gas involving a privately negotiated contract in a unique situation which has already been to the decisional level three times and in which Texas Gas, with the aid of the Commission, is merely seeking another decision more to its liking.

IV.

The Court of Appeals was fully empowered to decide the question of law for itself.

In discussing the review power question the petition for the Commission does not accord even a passing nod to §19(b) of the Natural Gas Act, although that section provides "the standards for judicial review" under the Act.[18] The other petitioners give it that but nothing more. Rather, petitioners dwell on the premise that the privately negotiated Shell contract is now classified as a "rate schedule" and that, they seem to feel, gives sanctity to the Commission's reading of the words of this contract even though the words are used therein in an ordinary, non-technical sense.

Section 19(b) of the Act reads in part (App. B):

> "Upon the filing of such petition such court [of appeals] shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. . . . The finding of the Commission as to the facts, if supported by substantial evidence shall be conclusive. . . . The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification. . . ."[19]

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[18] In *Colorado-Wyoming Gas Co.* v. *F. P. C.* (1945), 324 U. S. 626, at 634, this Court said: ". . . Congress has provided *the standards for judicial review under this Act.* §19(b)."

[19] Section 19(b) of the Act was amended in 1958 (Pub. L. 85-791, §19(b)) to read as shown in App. B hereto, yet Congress did not then change that portion of the section which gives conclusiveness

Nothing in §19(b) indicates a limitation upon the court to decide questions of law for itself.[20] But the Commission says the Court of Appeals could not decide for itself "the meaning of the favored-nation clause" and must accept the Commission's interpretation "if reasonably supported" (Comm. Pet. p. 12). Petitioners in No. 167 say (p. 9) "the court may not decide that the agency's reading is incorrect merely because the court would reach a different result, and it certainly may not find the meaning for the Commission." This latter position confuses fact review with law review, and the Commission's position is little more than that as there would seldom, if ever, be an administrative conclusion of law which could not be said to be "reasonably supported". We cannot visualize where petitioners' views would leave the reviewing courts. At the least, they would rewrite §19(b). At any rate, the court below, while acknowledging that the Commission's view was "abstractly conceivable" (as, we presume, are all administrative conclusions), concluded that it was not reasonable in law.[21]

In differing with its Examiner, the Commission did not employ any specialized knowledge, experience or other unique administrative attribute. It did no more than con-

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[20] The Administrative Procedure Act (60 Stat. 243, 5 U. S. C. §1009) expressly invests appellate courts with full review power of law questions. See, *Union Pacific RR Co.* v. *Price* (1959), ... U. S. ....., 3 L. ed. 2d 1460, 1471, 27 Law Week 4499 (dissenting opinion) where it is stated:

> "Tolerance of judicial review has been more and more the rule as against the claim of administrative finality. . . . The weight of the Administrative Procedure Act . . . is on the side of judicial review, the finality of administrative action being sanctioned only where it is clear from the statutory scheme that judicial review is precluded."

[21] The Commission's order was based on the erroneous premise that the February 1954 agreement could not itself be a contract. But see *American Colortype Co.* v. *Continental Colortype Co.* (1903), 188 U. S. 104. This court, speaking through Mr. Justice Holmes, held (*ibid.*, at 107):

> "The allegations show that, having the old contract before them, the parties came together under a new agreement, which was determined by reference to the terms of [the old] con- [illegible] but which none the less was present and immediate."

sider words used in their ordinary sense and rendered an opinion based solely upon its view of general principles of law. In denying Shell's request for oral argument, the Commission recognized that it resolved nothing but questions of law. It said (R. 142):

> "Because *the questions of law here involved* have been adequately briefed . . . we do not believe any purpose would be served by holding oral argument as requested by Shell."

And Texas Gas, one of the petitioners here, represented to the Commission that this case involved nothing but the reading of ordinary words. In its answering brief with the Examiner and the Commission, it was stated by Texas Gas that (p. 8):

> "This is *not* a case where the parties have used some technical terminology which has a special meaning so peculiar to the gas industry that no one else would understand it, or where there is a shorthand or cryptic use of business terminology needing definition for the layman. In short, there is nothing puzzling about the escalation provision."[22]

The Commission viewed the case in that light and resolved nothing but a general contract issue. The nature of the issue did not call for administrative specialty or expertness. It called for and got only the resolution of a general legal issue.

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[22] We have difficulty in reconciling this representation which Texas Gas made to the Commission with its reference in its petition here to the Court of Appeals' decision as "a classic illustration of the vice of unlimited review" (Pet. p. 8), and its statement that the Court "did not make even a gesture of deference to the Commission's special qualifications" (Pet. p. 9). And, especially where it states (p. 9): "Because this question (referring to the question in this case) 'involves matters peculiarly within the area of the Commission's special competence' ". Nor does Texas Gas explain how this special competence was acquired. Perhaps the reason lies in its earlier but incorrect statement (Pet. p. 6): "Here presented is *the first decision* by the full Commission interpreting the meaning of a rate schedule of an independent producer."

Involving neither factors of expertise nor language used in a special or technical sense, the Commission's decision, though perhaps required in this case by the doctrine of primary jurisdiction (*United States* v. *Western Pacific R. Co.* (1956), 352 U. S. 59), did not preclude the appellate court from itself examining the law question and setting aside the Commission's order if such examination lays bare an error of law.[23] And when the Court laid bare the error of law it remanded the cause to the Commission for the administrative determination of whether the Atlantic price was indeed higher than the Shell price, thus carefully observing the administrative function.

The question of construction of a tariff, especially where words are used in their ordinary sense, as here, presents solely a question of law. *Great Northern R. Co.* v. *Merchants Elevator Co.* (1922), 259 U. S. 285, 290; *W. P. Brown & Sons Lumber Co.* v. *Louisville & N. R. Co.* (1937), 299 U. S. 393.[24] And especially is that true of contracts of natural gas companies, as their contract powers are unaffected by the Gas Act (*United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.* (1956), 350 U. S. 332; *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Div.* (1958),

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[23] The rule that the court's power is exhausted when it lays bare the agency's error of law (*Federal Power Commission* v. *Idaho Power Co.* (1952), 344 U. S. 17, 73; *Federal Trade Commission* v. *Morton Salt Co.* (1948), 334 U. S. 37; *Federal Communications Commission* v. *Pottsville Broadcasting Co.* (1940), 309 U. S. 134; and *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission* (1957), 353 U. S. 944), of necessity recognizes the power of the court to decide the law question for itself.

[24] *United States* v. *Western Pacific R. Co., supra,* does not limit this rule as the Commission's petition suggests (p. 11). *Western Pacific* holds that the I. C. C. has primary jurisdiction to construe a tariff on file with it, especially where the classification of items as explosive or non-explosive is involved. We do not challenge the Power Commission's primary jurisdiction to construe a gas sale contract on file with it as a rate schedule, when, as here, the initial rate must be ascertained before the floor for a pending increase can be fixed. We maintain that when so doing, especially when words are used in their ordinary sense, the Commission is deciding a pure question of general law, and on review the appellate court has power to decide for itself whether the Commission reached the

358 U. S. 103.[23] The fact that contracts of natural gas companies are said to be "rate schedules" does not detract from their status as privately negotiated contracts, nor does it invest the Commission with a qualification not possessed by the courts to interpret their language.

This rule has been applied to review of an order of the Federal Power Commission by the Court of Appeals for the Tenth Circuit in *Phillips Petroleum Co.* v. *F. P. C.* (1955), 227 F. 2d 470, with *certiorari* denied by this Court (350 U. S. 1005). There the question resolved by the Commission involved an interpretation of its own regulations as well as a gas sale contract of an independent producer. In reversing the Commission, the Court held (227 F. 2d at 476):

> "We hold, therefore, that the [Commission's] orders of October 1st and December 8th were timely; that they were subject to review under Section 19(b) *as presenting purely questions of law involving the construction of a contract.* . . ."

That is precisely this case. And the considerations motivating the denial of *certiorari* in that case would appear to be equally applicable here.

Additionally, when an issue is resolved on the agency's version of applicable legal principles announced by courts (as was the case here), its result must be judged upon the basis of its action, and if the court differs with the legal result reached, the agency's ruling will be set aside.

[23] In the dissenting opinion in *Memphis*, 358 U. S. at 118, it is stated: "The construction of this tariff is a question of law (see *Great No. R. Co.* v. *Merchants Elec. Co.*, 259 U. S. 285, 290)". On this point it does not appear to us that there was disagreement between the majority and the minority, because this Court, as we read *Memphis*, actually did construe the service agreement for itself and concluded that the Commission's determination "was amply supported both factually and legally" and that the Commission had not "overlooked or misapprehended" any of the contentions made in that case (358 U. S. at 114).

Securities Exchange Commission v. *Chenery Corp.* (1943), 318 U. S. 80

In support of its view that even some questions of statutory interpretation have been left to the administrative agencies with but limited review by the courts (p. 9), the Commission's petition cites (fn. 10, p. 9) such cases as *N. L. R. B.* v. *Hearst Publications* (1944), 322 U. S. 111. Whether the same result would have been reached had *Hearst Publications* been decided after the passage of the Administrative Procedure Act need not be examined, as there the Board's construction of the term "employee" under the Labor Act was upheld because the question was one "of specific application of a broad statutory term" (322 U. S. at 131) and ". . . the Board's determination that specified persons are 'employees' under this Act is to be accepted if it has 'warrant in the record' and 'reasonable basis in law' " (322 U. S. at 131).

More to the point (in addition to *Great Northern* and *W. P. Brown & Sons, supra*) are such decisions as *Natural Gas Pipeline Co.* v. *Federal Power Commission* (1958), 3 Cir., 253 F. 2d 3, cert. den., 357 U. S. 927, and *Phillips Petroleum Co.* v. *Federal Power Commission, supra,* in each of which the Court reversed the Commission on the question of what was the effective June 7, 1954 rate of a producer. The resolution of these questions by the Commission involved its interpretation of its own regulations and the Gas Act, and the *Phillips* case (227 F. 2d 470) also involved the construction of a filed contract of an independent producer.[26]

The issue on which this case turns is, we believe, unquestionably a pure law question. It required no more than

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[26] On statutory interpretation, the Commission says nothing of the landmark *Phillips* case (*Phillips Petroleum Co.* v. *Wisconsin* (1954), 347 U. S. 672) in which the Commission's long-standing interpretation of the jurisdictional coverage of the Natural Gas Act was upset because it was legally incorrect.

construing ordinary words used in their ordinary sense, and then determining whether a given set of circumstances constitutes entry into a contract. That, we submit, can be viewed in no other reasonable light than presenting solely a law question.

The Memphis Decision.

Petitioners rely heavily upon *United Gas Pipe Line Co. v. Memphis Light, Gas and Water Div.* (1958), 358 U. S. 103,[27] to support their contention that the Court of Appeals was powerless to decide for itself the issue of law involved in this case (Comm. Pet. pp. 10-12; Texas Gas & Louisville Pet. pp. 9, 16).

As we read *Memphis* it seems to us that on its main point it is but a sequel to *Mobile, supra.* On the judicial review point the issue was whether the pipeline's service agreements had actually reserved to it the power to make rate changes. The Commission found the agreements so intended, but the Court of Appeals found it unnecessary to decide the question.

In that setting, this Court found it unnecessary to remand to the Court of Appeals (both parties had asked this Court to decide the case in its posture before the Court), "for consideration of that issue, which involves matters peculiarly within the area of the Commission's special competence and as to which we could hardly be aided by a

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[27] The Commission also cites (p. 9) *Far East Conference* v. *U. S.*, 342 U. S. 570 and *U. S.* v. *Western Pac. R. Co., supra.* In *Far East Conference* the Court held that the administrative agency "should not be passed over" in cases "raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion. . . ." 342 U. S. at 573. In *T. I. M. E. Inc.* v. *U. S.* (1959), ... U. S. ....., 3 L. ed. 2d 952, this Court recently had occasion to say what it held in *Western Pacific R. Co.*, thus (3 L. ed. 2d at 960):

> "The Government's reliance upon *United States* v. *Western Pacific R. Co.*, 352 U. S. 59 . . . is misplaced. . . . The case decided no more than that referral to the I. C. C. of the issue of 'unreasonableness' . . . was not foreclosed by the fact that affirmative reparation relief before the Commission would have been barred by limitations."

further examination of the record by the Court of Appeals." But then this Court scrutinized the record and found the Commission's determination amply supported "both factually and legally", and that the Commission had not "overlooked or misapprehended" any of the parties' contentions. The Court's language is (358 U. S. at 114):

> "After scrutinizing the record we are satisfied that the Commission's determination as to the meaning of the service agreements here involved was amply supported both factually and legally."

And the Court continues (*ibid*):

> "There is no necessity for us to embark upon a detailed discussion of the various contentions made by the parties, none of which appears to have been overlooked or misapprehended by the Commission."

Then appears what we believe to be the primary reason why the Court credited whatever "special competence" it did to the Commission's findings, namely *(ibid)*:

> "It seems sufficient to say that the record shows that these agreements are typical of the 'tariff-and-service' arrangements *contemplated by Commission Order No. 144,* 18 CFR §154.1 *et seq.* . ."

A footnote (No. 8) gives some of the background to Commission Order No. 144 and reads in part (*ibid*):

> "It is noteworthy that Order No. 144 expressly contemplates that a seller may reserve the 'privilege' of filing rate changes under §4 of the Act. 18 CFR §154.38(d)(3)."

The briefs for petitioners in *Memphis* went to considerable length to show the "superseding" rate schedule clause there involved was designed with Commission cooperation and approval as an effective means of permitting the pipelines to file increased rates whenever they felt the need.

In the Commission's Petition for Certiorari in *Memphis* it is represented (p. 16, fn. 15):

> "It was in response to industry objections that the Commission inserted the 'provisos' in Section 154.38(d)(3) of Order No. 144 . . . which permitted the companies to reserve the right in their service agreements to change rates by filing new schedules."

And in its brief on the merits in *Memphis*, the Commission, in referring to the "superseding" rate schedule provision, said (p. 23):

> "In addition, the pricing provision closely adheres to the language and format of Commission Order No. 144, which clearly provides for such a reservation."

And, *ibid.* at p. 107:

> "By thus *echoing* the Commission's Order (in using the 'superseding' clause), the parties indicated that the contractual phrase should be read in the light of and in conjunction with the Order."

Thus in *Memphis* the contract language construed by the Commission was, in effect, written by it to accomplish a specific objective. In that setting, but unlike the one of this case, the matter may well have been "peculiarly within . . . the Commission's special competence" (358 U. S. at 114).

Uniformity, Agency's Specialized Knowledge, and Purposes of the Statute.

The petition for the Commission emphasizes three factors as to why the Commission's conclusion is binding on the reviewing court, viz. (p. 9): (1) the desirability of uniformity, (2) the bearing of the agency's specialized knowledge upon resolution of the question, and (3) the implicit purposes of the statute.

There is no question but that in a proper setting these factors are entitled to their just due in ascertaining the weight to be accorded the administrative finding. But this case with its unique issue and circumstances is not within that setting because:

(1) Uniformity—In a contract construction case requiring only the reading of words used in their ordinary sense, review by the Courts is available, and uniformity of construction is secured. *Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U. S. at 290. On pure questions of law, as here, uniformity results from specialized judicial competence, not administrative competence. The essence of judicial review is to correct administrative error and achieve and maintain uniformity.

(2) Agency's specialized knowledge—The privately negotiated contracts involved here, and the private negotiations between Atlantic and Louisiana culminating in the February 1954 agreement, were such that the task of resolving their meaning and effect did not require any special administrative expertness. Unlike the contracts involved in *Memphis* where the Commission had in effect written the clause there in issue, the contracts involved here resulted from private negotiations and embodied language used in its ordinary sense. The Commission's recently asserted jurisdiction over producers' contracts is not apt to have so quickly given it a knowledge superior to the Court of Appeals in reading such privately negotiated contract language and in deciding that the February 1954 agreement constituted entry into a contract.

(3) The implicit purposes of the statute—The statutory purpose is embodied in §19(b) of the Gas Act. The purpose of the Act is to grant the reviewing court power to review "an order issued by the Commission" (App. B). The only limitation is that fact findings are conclusive where supported by substantial evidence. In dealing with private disputes arising under gas contracts, it would not serve the statutory purpose and

> would contravene the provisions of §19(b), to give finality, where Congress did not, to Commission resolution of such disputes merely because they happen first to come to the decisional level before the Commission because of its custodianship of the documents. If Congress had intended such to be the law, it undoubtedly would have said so in §19(b) when it was dealing specifically with the judicial review question. The fact that it did not, but rather left the review power unlimited except as to fact findings, is an exceedingly strong indication as to the purpose which the statute was intended to accomplish.

There is nothing to suggest that this case involved any specialized administrative competence or the construction of special or technical words. This case emerges from unique circumstances and involves simply the resolution of a dispute between the parties to a privately negotiated contract.

We submit that the Natural Gas Act did not envisage the courts as playing such a secondary role in the review of agency conclusions on questions of law, as petitioners contend for. To distort the Act as petitioners suggest would essentially deprive the Courts of Appeal of their statutory power to review and "to affirm, *modify, or set aside* such order in whole or in part" (App. B), and would leave them only with the chore to "*affirm*".

Conclusion.

We respectfully submit that the decision of the Court of Appeals is correct; that the Court fully observed the Commission's power when it remanded the cause after the Commission's error of law was laid bare; that this case involves essentially the resolution of a private contract dispute, and because of its peculiar circumstances (especially the uniqueness of the price agreement clause of the 1943

Defense Plant contract and the interaction of that clause with the Shell clause) the decision below is not of general importance and cannot affect other cases; nor does the decision below conflict with the *Memphis* decision. No question is presented which would warrant further review by this Court.

Accordingly, the petitions for writs of certiorari should be denied.

Respectfully submitted,

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